

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

June 29, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

**No. 94-3230-FT**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

**IN THE MATTER OF THE ESTATE OF  
LEROY A. KAI, DECEASED:**

**PAUL KAI,**

**Appellant,**

**v.**

**MARGIE KAI,**

**Respondent.**

APPEAL from an order of the circuit court for Rock County:  
JAMES DALEY, Judge. *Affirmed.*

Before Eich, C.J., Dykman and Sundby, JJ.

PER CURIAM. Paul Kai, son of Leroy A. Kai, deceased, appeals from an order refusing to admit LeRoy's will to informal probate upon a finding

that the will was not executed in accordance with law. For the reasons set forth below, we affirm.<sup>1</sup>

The parties do not dispute that when witness Phillip M. Lancaster signed the will, witness Valorie Lancaster was in another room and could hear, but not see, Phillip signing. On these facts, the trial court found that the will could not be admitted to informal probate because it was not signed by the witnesses in the presence of each other. Section 853.03, STATS., provides in part:

Every will in order to be validly executed must be in writing and executed with the following formalities:

....

(2) It must be signed by 2 or more witnesses *in the presence of the testator and in the presence of each other.*

(Emphasis added.)

Paul argues that because Valorie was in an adjoining room and could hear the circumstances surrounding LeRoy's request that Phillip sign, Valorie was constructively present. In *Estate of Haugk*, 91 Wis.2d 196, 207-09, 280 N.W.2d 684, 689-90 (1979), our supreme court rejected the concept of constructive presence. Citing *Estate of Wilm*, 182 Wis. 242, 244, 196 N.W. 255, 255 (1923), the court held that the "presence" requirement of § 853.03, STATS., must be "strictly constru[ed]" to require a will to be witnessed by two witnesses in the presence of one another and in the presence of the testator. In *Estate of Hulett*, 6 Wis.2d 20, 26, 94 N.W.2d 127, 130 (1959), the court stated:

A person in whose presence an act is done must be informed of what is taking place so that he actually knows what is being done; or the act is not done in his presence,

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<sup>1</sup> This is an expedited appeal under RULE 809.17, STATS.

no matter how close to him it may be done. *A will is not signed in the presence of one who is attending to another matter and does not know what is taking place until he is told later.*

(Citing 1 PAGE, WILLS § 354 (lifetime ed.)) (emphasis added).

Valorie may have been informed later that Phillip signed the will; however, she did not see the signing take place, nor was she told until afterwards that Phillip and Leroy had signed. Such an execution of the will does not satisfy the "presence" requirement of § 853.03, STATS.

*By the Court.* – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.